Supreme Court, U.S.
FILED
NOV 5 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-574

In The
Supreme Court of the United States

October Term, 1986

City of Scottsdale, a municipal corporation,
Petitioner,

v.

Joyce M. Corrigan,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS STATE OF ARIZONA

RESPONDENT'S BRIEF IN OPPOSITION

James Powers
FENNEMORE, CRAIG, von AMMON, UDALL & POWERS, P.C.
1700 First Interstate Bank Plaza
100 West Washington Street
Phoenix, Arizona 85003
(602) 257-8700

Counsel for Respondent

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
JURISDICTION	1
CONSTITUTIONAL PROVISIONS AND ORDINANCES INVOLVED	1
REASONS FOR DENYING THE WRIT	2
I. The Decision Below Rests Wholly on the Arizona Constitution	2
II. The City's Petition Is Untimely	3
CONCLUSION	6
APPENDIX	

TABLE OF AUTHORITIES

Cases *Pages*

Fox Film Corp. v. Muller, 296 U.S. 207 (1935) 1, 3

San Diego Gas & Electric Co. v. City of San Diego, 450 U.S. 621 (1981) 5

Constitutional Provisions, Statutes & Regulations

United States Code:
28 U.S.C. § 2101(c) 4

United States Constitution:
Fifth Amendment 1, 2, 5
Fourteenth Amendment 1, 5

Arizona Constitution:
Article 2, Section 17 1-3

Rules:
Ariz. R. Civ. App. P. 22(d) 4

No. 86-574

In The
Supreme Court of the United States

October Term, 1986

City of Scottsdale, a municipal corporation,
Petitioner,

v.

Joyce M. Corrigan,
Respondent.

Respondent Joyce M. Corrigan respectfully requests that this Court deny the petition for a writ of certiorari to the Arizona Court of Appeals.

JURISDICTION

The Court lacks jurisdiction to review this case because:

1. The issues decided below were decided on adequate and independent state grounds. *See, e.g., Fox Film Corp. v. Muller,* 296 U.S. 207, 210 (1935).

2. The petition is not timely. If it seeks review only of the taking issue it is too late; if it seeks review of the whole case it is premature. The judgment at which the petition purports to be directed is not a final judgment, and it decided a wholly different question than the one upon which review is now sought.

CONSTITUTIONAL PROVISIONS AND ORDINANCES INVOLVED

In addition to the Fifth and Fourteenth Amendments to the United States Constitution and the Scottsdale Zoning Ordinance cited by the City, this case also involves Section

17 to Article 2 of the Arizona Constitution, which is reproduced in Appendix A to this brief.

REASONS FOR DENYING THE WRIT

I.

The Decision Below Rests Wholly on the Arizona Constitution.

The holding of the Arizona Court of Appeals, of which petitioner now seeks review by this Court, is represented by the following excerpt from its opinion:

> The ordinance in question is particularly beguiling in that it attempts to achieve a laudable goal—preservation of the McDowell Mountains in their natural state—without apparent cost. However we conclude and therefore hold that the Hillside Ordinance is void as an unconstitutional taking of appellant's property without just compensation. In reaching this conclusion we have determined that the Hillside Ordinance is an invalid use of police power and therefore it constitutes a taking of property for which just compensation must be made as required by both federal and state constitutions. Further, we hold that under Section 17, article 2 of the Arizona Constitution the transfer of density credits does not constitute just compensation for property taken by eminent domain. This provision of our state constitution requires compensation for such a taking to be made by payment of money in an amount that has been judicially determined. Ariz. Const. art. 2, Section 17. The transfer of density credits cannot meet this state constitutional requirement. We therefore reverse the judgment of the trial court.

(Petitioner's Appendix at 25a).

The issue raised now is whether that holding would be affected, one way or another, by a decision from this Court on the scope of the taking clause of the Fifth Amendment to the United States Constitution. A fair reading of the opinion of the Arizona Court of Appeals makes it clear that its holding would not be changed. The holding is wholly supported by the Arizona Constitution, especially Section 17 of

Article 2, and thus rests upon an adequate and independent state ground. *See, e.g., Fox Film Corp. v. Muller,* 296 U.S. 207, 210 (1935).

If this Court should conclude that the state court was mistaken in placing any reliance at all on the federal Constitution, and that the enactment of this ordinance was not a taking under the Fifth Amendment, there is no ground for supposing that the state court would modify its interpretation of the quite different provisions in the Arizona Constitution. As a consequence, the petition here is no more than an invitation to this Court to write an essay on the taking clause of the Fifth Amendment, an essay that would have no effect on the outcome of the litigation. The Court should decline the invitation.

II.

The City's Petition Is Untimely.

In February of 1985, the Arizona Court of Appeals ruled that the Hillside Ordinance, prohibiting any disturbance of the natural terrain on more than 3,500 acres of the landowner's property, was invalid as an unconstitutional taking of that property. It declined, however, to hold that the landowner was entitled to damages for the period that the ordinance was in effect.

On November 14, 1985, the Arizona Supreme Court denied the City's petition for review directed at the holding of an unconstitutional taking but, at the same time, it granted the landowner's petition for review (Petitioner's Appendix at 45a) in order to decide whether "a landowner is entitled to money damages for a temporary taking of property by reason of an invalid zoning ordinance." (Petitioner's Appendix at 30a).

This denial of the City's petition for review was the final act of the highest court in the state on the taking issue. [1] If that is the issue on which review is sought, the petition comes too late. The time for filing it has long since expired, including the discretionary additional time allowed by 28 U.S.C. § 2101(c).

The Arizona Supreme Court ultimately held that a landowner may be entitled to monetary damages for the period of time during which an unconstitutional zoning ordinance prevents any use of the landowner's property. On a motion filed by the City, the court refused to reconsider that holding. It is apparently this denial of its motion for reconsideration which the City now relies upon as a "final judgment or decree" justifying this petition. (Petitioner's Appendix at 49a).

But that is not what the petition is about, nor is it the issue that the City asks this Court to review. Nowhere in its list of Questions Presented does the City mention the only issue decided by the Arizona Supreme Court—the right to seek compensation for an invalid zoning ordinance. (Petition at (i)).

What the City wants here is review of the taking issue and that was an issue decided by the Arizona Court of Appeals in February of 1985. When, on November 14, 1985, the Arizona Supreme Court refused to consider that issue, that refusal was *the* final judgment by the highest court in the state on the constitutional invalidity of the ordinance. The period for filing this petition began to run at that time, and it has now expired.

If, however, the foregoing analysis is incorrect, and the action of the Arizona Supreme Court on November 14 of 1985

---

[1] Arizona practice does not permit the filing of a motion for reconsideration when a petition for review is denied except by specific order of the court. Rule 22(d), Arizona Rules of Civil Appellate Procedure. The City moved for permission to file such a motion, but it was denied. See Appendix B to this brief. This leaves the November 14, 1985 ruling as the final judgment of the Arizona Supreme Court on the taking issue.

was not a final judgment adequate to support a petition for certiorari, then no such judgment has yet been rendered, and this petition is consequently premature.

The City contends no more than this: "The only federal question presented in this case concerns the Taking Clause of the Fifth Amendment as read into the Fourteenth Amendment." (Petition at 6). Generally, such a "federal constitutional question embraces not only a taking, but a payment of just compensation. A state judgment is not final unless it covers both aspects of that integral problem." *San Diego Gas & Electric Co. v. City of San Diego,* 450 U.S. 621, 633 (1981) (quoting *North Dakota Board of Pharmacy v. Snyder's Drug Stores, Inc.,* 414 U.S. 156, 163 (1973)). Here, the Arizona Supreme Court remanded to the trial court the issue of damages claimed by the landowner because of the temporary prohibition on any use of her property. The retrial has not yet occurred. If the issues of taking, compensation and damages are regarded as so intertwined that the denial of review on the taking question was not a final judgment, then there has been no final judgment at all.

This Court need not decide what would constitute a reviewable judgment in this case—whether it was the final action of the Arizona Supreme Court on the taking issue or whether it will be the ultimate decision after the damage trial. Under either analysis, the present petition is untimely.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

James Powers

FENNEMORE, CRAIG, von AMMON,
UDALL & POWERS, P.C.
1700 First Interstate Bank Plaza
100 West Washington Street
Phoenix, Arizona 85003
(602) 257-8700

Counsel for Respondent

November 5, 1986

APPENDIX A

ARIZONA CONSTITUTION

Article 2, Section 17

Private property shall not be taken for private use, except for private ways of necessity, and for drains, flumes, or ditches, on or across the lands of others for mining, agricultural, domestic, or sanitary purposes. No private property shall be taken or damaged for public or private use without just compensation having first been made, paid into court for the owner, secured by bond as may be fixed by the court, or paid into the State treasury for the owner on such terms and conditions as the Legislature may provide, and no right of way shall be appropriated to the use of any corporation other than municipal, until full compensation therefor be first made in money, or ascertained and paid into court for the owner, irrespective of any benefit from any improvement proposed by such corporation, which compensation shall be ascertained by a jury, unless a jury be waived as in other civil cases in courts of record, in the manner prescribed by law. Whenever an attempt is made to take private property for a use alleged to be public, the question whether the contemplated use be really public shall be a judicial question, and determined as such without regard to any legislative assertion that the use is public.

APPENDIX B

SUPREME COURT OF ARIZONA

JOYCE M. CORRIGAN,

Plaintiff-Appellant,

vs.

CITY OF SCOTTSDALE, a municipal corporation,

Defendant-Appellee.

Supreme Court
No. 18239-PR

Court of Appeals
No. 1 CA-CIV 6300

Maricopa County
No. C-359908

ORDER

IT IS ORDERED denying Appellee's "Motion for Leave to File Motion to Reconsider Denial of Petition for Review."

DATED this 16th day of January, 1986.

/s/ WILLIAM A. HOLOHAN
Chief Justice

TO:

John P. Frank, Esq., and Michael O. Miller, Esq., Lewis & Roca, 100 West Washington, Phoenix, Arizona 85003

William E. Farrell, Scottsdale City Attorney, 3939 Civic Center Plaza, Scottsdale, Arizona 85251

S. L. Schorr, Esq., and Frank S. Bangs, Jr., Schorr, Eldridge & Bangs, P.C., 5210 East Williams Circle, Suite 600, Tucson, Arizona 85711

James Powers, Esq., Fennemore, Craig, Von Ammon, Udall & Powers, P.C., 100 West Washington, Suite 1700, Phoenix, AZ 85003

pgk

No. 86-574

In The
Supreme Court of the United States

October Term, 1986

CITY OF SCOTTSDALE, a municipal corporation,
Petitioner,

v.

JOYCE M. CORRIGAN
Respondent.

CERTIFICATE OF SERVICE

I, JAMES POWERS, a member of the Bar of this Court, hereby certify that on this 5th day of November, 1986, three copies of Respondent's Brief in Opposition on Petition for a Writ of Certiorari to the Court of Appeals State of Arizona in the above-entitled case were delivered to John P. Frank, Esq., Lewis and Roca, 100 West Washington Street, Suite 2400, Phoenix, Arizona 85003, counsel for petitioner. I further certify that all parties required to be served have been served.

James Powers

Fennemore, Craig, von Ammon, Udall
& Powers
100 West Washington Street, Suite 1700
Phoenix, Arizona 85003
(602) 257-8700
Counsel for Respondent

APPEARANCE FORM

SUPREME COURT OF THE UNITED STATES

No. 86-574

City of Scottsdale (Petitioner or Appellant) vs. Joyce M. Corrigan (Respondent or Appellee)

The Clerk will enter my appearance as Counsel of Record for Joyce M. Corrigan

(Please list names of all parties represented)

who IN THIS COURT is ☐ Petitioner(s) ☒ Respondent(s) ☐ Amicus Curiae ☐ Appellant(s) ☐ Appellee(s)

I certify that I am a member of the Bar of the Supreme Court of the United States:

Signature James Powers

(Type or print) Name James Powers

☒ Mr. ☐ Ms. ☐ Mrs. ☐ Miss

Firm Fennemore, Craig, von Ammon, Udall & Powers

Address 100 West Washington Street, Suite 1700

City & State Phoenix, Arizona Zip 85003

Phone (602) 257-8700

ONLY COUNSEL OF RECORD SHALL ENTER AN APPEARANCE. THAT ATTORNEY WILL BE THE ONLY ONE NOTIFIED OF THE COURT'S ACTION IN THIS CASE. OTHER ATTORNEYS WHO DESIRE NOTIFICATION SHOULD MAKE APPROPRIATE ARRANGEMENTS WITH COUNSEL OF RECORD.

ONLY ATTORNEYS WHO ARE MEMBERS OF THE BAR OF THE SUPREME COURT OF THE UNITED STATES MAY FILE AN APPEARANCE FORM.

IT IS IMPORTANT THAT ALL REQUESTED INFORMATION BE PROVIDED.

CO-73A